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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLANT IN REPLY TO BRIEF OF RESPONDENTS AND BRIEF OF AMICI CURIAE

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APPELLANT'S REPLY BRIEF

SCOPE OF THIS BRIEF

It is the purpose of this brief to make a short reply to the "Brief of Respondents" and under Part II of this brief to make a short reply to the brief filed by the American Civil Liberties Union and International Juridical Association, *amici curiae*.

PART I

REPLY TO RESPONDENTS' BRIEF

Material Facts

In the "Brief of Respondents" (pp. 2-9), reference is made to the relations between the appellant and the appellees

prior to the time that the contract (Plaintiff's Exhibit 1, R. 112) was left with the appellant and the appellees demanded his signature thereto. Apparently, the reference to the relations which existed between the appellant and the appellees prior to said time is made for the purpose of showing that the picketing and related activities engaged in by the appellees were engaged in because of some dispute other or further than the dispute over the appellant's refusal to sign the contract unless it was amended to enable him to work with his hands in his own business.

As we point out on pages 3-5 in "Appellant's Brief in Opposition to Appellees' Motion to Dismiss," the sole dispute which existed between the appellant and the appellees at the time that the appellees started to picket him and during the trial of the case at bar was concerning appellant's refusal to sign the contract unless it was amended so as not to deprive him of the right to work with his hands in his own business (R. 26-27, 43, 67).

In appellees' brief, inferentially at least, it is made to appear that the contract, which they demanded that the appellant sign, contained the clause prohibiting him from working with his hands in his business *because he was not qualified to do the work*. There was no finding made by the trial court and no determination by the appellate court that the appellant was not qualified to do the work. On the contrary, the evidence clearly establishes the fact that he was fully qualified (R. 50, 64-65, 81-82, 83, 99-100). Senn's qualifications were not in issue. The clause in the contract, requiring him to give up his right to work with his hands in his own business, was a requirement of the appellees imposed upon all employers in the business (R. 32, 67, 84), and the trial court so found (Finding of Fact No. 15, R. 28).

Preliminary Statement

Under this heading, counsel states (Respondent's Brief, p. 12) that since the adoption of the Norris-La Guardia Act, the Legislatures of seventeen states have enacted similar or identical legislation with respect to state courts. As we point out in "Appellant's Brief in Opposition to Appellee's Motion to Dismiss" (p. 7), in the respect that the Wisconsin Labor Code (in Section 103.53) provides that conduct therein described, engaged in in the course of labor disputes, is lawful, it differs from the Norris-La Guardia Act. The Norris-La Guardia Act and the statutes of those states which are patterned after it merely limit the jurisdiction of the courts in the issuance of injunctions in cases involving labor disputes. They contain no provisions similar to those contained in Section 103.53 of the Wisconsin Labor Code, defining "lawful conduct in labor disputes."

None of the cases cited by counsel at pp. 13 and 14 of his brief presented the constitutional questions here involved.

Argument

At pages 16-19 of the Brief of Respondents, the contention is made that, because of appellant's refusal to agree not to work with his hands in his own business, it is their right to classify him as a non-union contractor and to picket him and advertise the fact that he is unfair. In support of his contention, *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260, is cited. Among other reasons clearly apparent upon reading this case, it will be found not to be in point for the reason that it did not involve any demand upon an employer to give up his right to work with his hands in his own business.

At pp. 19-21 of the Brief of Respondents, the contention is made that it is as much the right of the respondents to appeal

to the public not to patronize Senn and to inform the public that he is a non-union contractor as it is his right to continue to work in his business with his hands. The answer to this is, in the words of the minority opinion (R. 127):

> "The plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat to 'beat him up' every time he took a contract for tiling. In the latter case he could make his contract and take his beating, if he wanted to, but it is quite apparent that he would not want to, and would refrain from subjecting himself to the threatened beating. A labor union may not use its power to such ends and with such effect.

In support of this statement, *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439, 55 L. Ed. 797, is cited, and the following language of this court in said case is referred to:

> "'The law, therefore, recognizes the right of the workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "'But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventitive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.'" (R. 127-128)

In the case at bar, the appellant was harrassed, followed on the streets, picketed and bannered with signs holding out to the public that he was *unfair* to the Tile Layers Protective Union and should not be patronized. The statements of the

unions that Senn was unfair are truthful only if it is "unfair" for an employer to refuse to give up his right to work with his hands in his own business. Senn was perfectly willing to agree to all of the demands of the union covering wages, hours and working conditions. However, when the union coupled the aforementioned demands with an additional demand that Senn lay down his tools and do no work in the performance of his contracts, Senn refused to submit to that; and it is that refusal and none other which called into being the so-called economic pressure exerted against him by the unions. Holding Senn out as being unfair when he was willing to sign a closed shop union contract with the unions and agree to all of their demands, excepting the single demand that he give up his right to work with his hands in his business, is, we submit, a rather violent misuse of the term "unfair."

It is our position that no statute can, consistent with the Fourteenth Amendment to the Federal Constitution, empower a union to brand an employer as being unfair to organized labor and picket him merely because he refuses to give up his right to work with his hands in his own business.

Counsel states (Respondents' Brief, p. 20):

> "If the fact that appellant has the right to do a certain thing renders illegal the demand that he do otherwise, then the respondents cannot have a labor dispute respecting any demand which the appellant has a right to refuse."

It is our position that the *demand* that an employer give up his right to work in his own business is illegal, not because the employer has the right to work in his own business, but because of the fact that *the unions had no right to demand that the employer give up that right*. For example, we do not here question the right of labor unions representing employees to make a demand upon an employer on be-

half of the employees they represent covering wages, hours and working conditions. It is quite a different thing, however, when labor unions representing none of an employer's employees demand of the employer that he give up his right to work with his hands in his own business—a demand that *employees* could not legally make upon their employer.

It is significant to note in this connection that the demand upon Senn to give up his right to work with his hands in his own business was unconditional. No attempt was made to restrict the number of hours which he could work or to impose any limitations upon his right to work which had any relationship to the hours and working conditions of his employees.

At pages 21-30 of the Brief of Respondents, the point is made that unions have an interest in securing work for their members in competition with others and that they may "exert lawful economic pressure to displace non-union men with union men." In the case at bar, the unions asked Senn to displace his non-union *employees* with union employees and he was willing to accede to this demand. We have found no case, and counsel has cited none, which holds that unions have the right to "exert lawful economic pressure to displace" an *employer* in his own shop. On the other hand, as we point out in our main brief, all the cases that have passed on this point have held that such "economic pressure" cannot be exerted for such purpose.

A case apparently greatly relied upon by counsel is the case of *Zoat (Zaat) v. Building Trades Council,* 172 Wash. 445, 20 Pac. (2d) 589, cited at page 26 of his brief. An examination of this case will show that it is clearly not in point for the following reasons, among others:

1. No question under the Fourteenth Amendment to the Federal Constitution was involved.

2. There was no picketing engaged in or any application to have any picketing, actual or threatened, restrained.

3. The case went off on a demurrer and apparently the court sustained the demurrer on the ground that the elements of damage were not properly pleaded and that a mere general allegation that the plaintiff has sustained damage in the sum of $1,000.00 was not sufficient under the Washington law.

Whether or not the union represented any of the employer's employees does not appear.

On pages 27-30 of the Respondent's Brief, the argument is made that a contractor working with the tools of the trade may underbid those who do not do so and so affect respondents to their detriment. It is stated in this connection (Respondents' Brief p. 28) that the employer may work Sundays, all hours he pleases, and figure his own personal labor at a much lower scale than that paid to the union and is able to underbid contractors who agree with the union not to work with the tools of the trade in the business.

The answer to that argument is this: There is nothing to stop a contractor from doing all Senn can do, namely to work with his hands in his own business, unless the union has caused the employer to give up this right by contract with the union. The advantage that Senn may have over other contractors, if any, of which the unions complain, is thus *of the union's own creation*. As we heretofore point out, there was no demand or attempt made to regulate Senn's hours. On the contrary, the unions said to Senn, in effect: "You are disqualified from working because you are an employer. As an employer you cannot work with your hands *at any time* and *under no conditions*. We are not satisfied to limit your hours or impose certain restrictions on your right to work in your business. We are telling you that

you can't work at all!" In this connection, it is significant to note that Senn advised the business agent of the tile setters union, Mr. Schreiber, that he was willing "to agree to employ union setters and union helpers on each job, regardless (of) size, but reserved the right to work with those men, *during their working hours.*" (Italics ours) (R. 35).

Counsel states, at pages 31-36 of his brief, that the demand upon Senn that he agree not to work with his hands in his business was reasonable so that an employer could not circumvent the requirement as to the employment of union men by going into partnership with those working with him. If this contention has any merit at all, which we contend it has not, and it was the desire of the unions to merely prevent resort to what they call the "subterfuge of partnership," why did not the unions provide that in the event that the employer was a partnership, that then and then only would the employers not have the right to work in their business?

Be that as it may, Senn was a sole trader and the demand made upon him by the unions was that even though he continued to be a sole trader he had to give up his right to work with his hands in his business. No provision was made to enable Senn to continue to work with his hands in his business so long as he remained a sole trader.

Counsel states, at page 38 of his brief:

> "His (Senn's) right are no greater or less than those of his employees. Nor are they greater or less than those of organized labor. Each is asserting an allowable and recognized right."

No dispute between Senn and his employees is here involved. As we point out in our main brief on the merits, the conduct of the unions in the case at bar is illegal by reason of the illegality of the object and for the further reason that the activities are engaged in by a combination

of persons neither employees nor representing any of the employees of Senn.

At pages 45-46 of Respondent's Brief appears an excerpt from a quotation in a note at 3 A. L. R. 1295. The excerpt quoted by counsel ends with the statement, " 'So, also, it would seem that in order to procure the work for themselves, one's employees might lawfully give their employer the option of relinquishing the work done by him, or of doing without their services (citing cases).' "

May we call the court's attention to the fact that the note quoted from goes on to say,

> "even though they (one's employees) may not do so for the purpose of compelling him to employ another member of their union."

If the employees themselves cannot do that and a strike of the employees for that object would not be legal, how can it be said that a combination of persons, neither employees nor representing employees of an employer, may picket and harrass him for the purpose of "compelling him to employ another member of their union."

Under Points II and III of the Respondent's Brief, the position is asserted that the Wisconsin Labor Code merely incorporated into statutory form the principles of the common law of Wisconsin and other states. This is not true. In *A. J. Monday Co. v. Automobile, A. & V. Workers,* 171 Wis. 532, 177 N. W. 867, the question presented to the Supreme Court of Wisconsin was whether or not a *strike of employees* for a closed shop was made legal by Chapter 211 of the Laws of Wisconsin of 1919, which provided that no restraining order or injunction shall issue in disputes "concerning terms or conditions of employment." In holding that a strike for a closed shop was illegal, the Supreme Court of Wisconsin stated (p. 540):

"Ch. 211 was an attempt to engraft upon the laws of this state certain provisions of the act of Congress of October 15, 1914 (38 U. S. Stats. at Large, 730, ch. 323), commonly known as the Clayton Act. This was done without any reference to the fundamental distinction between the power of Congress to regulate procedure in and limit the jurisdiction of federal courts, inferior to the United States supreme court, and the power of the legislature to regulate procedure and limit the jurisdiction of the courts created by the constitution of a state.

"We shall not enter into any discussion of the provisions of ch. 211, the economic policies involved therein, or the constitutionality of that act, for we are of the opinion that it has no application to the facts in this case; hence any discussion here would be merely academic. The right of an employer to exercise his constitutional privilege as to whom he will employ has been fully established in this state. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098.

"*The provisions of sec. 1, ch. 211, are simply declaratory of the law as it existed prior to its enactment.* No one is here contending that *Local No. 25* is an illegal combination. No question of wages is involved, so the declaration of this section as to the character of labor is immaterial here. Sub. 1, sec. 2, provides that working people may organize themselves into an association for certain purposes there enumerated. The strike involved in this case was not called for the purpose of doing any of the things therein enumerated. It is a strike purely and simply for the closed shop. The closed shop does not aid the members of *Local No. 25* to become more skilful or efficient workers, to promote their general welfare, elevate their character, or to regulate their wages, hours, or conditions of labor in any except an indirect and remote way. It is conceded in this case that the plaintiff was paying the union scale of wages, and there is here no complaint as to the conditions under which the employees of the plaintiff were required to work. Sub. 2, sec. 2, provides that injunctions shall not issue in disputes 'concerning terms or conditions of employment.' In this case there is no such dispute. This

> is a strike to compel the plaintiff to employ none but the members of the union, and thereby to prevent him from employing persons not members of the union. It has nothing to do with wages, hours, or conditions of employment." (Italics ours)

In this connection, we respectfully request that this court read the case of *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098, referred to by the Supreme Court of Wisconsin in the *Monday* Case. The *Kreutzberg* Case contains a very exhaustive and illuminating discussion on the limitations of the police power of the state, particularly applicable to the consideration of that question in the case at bar.

If, as held by the Supreme Court of Wisconsin in the *Monday* Case, under the established law of Wisconsin, a strike of employees for a closed shop was illegal, it is not difficult to imagine what the Supreme Court of Wisconsin, prior to the enactment of the Wisconsin Labor Code, the constitutionality of which is here involved, would have said if it had been called upon to pass upon the facts here involved. Here we not only have *no strike of employees*, but we have picketing by strangers to establish not only a closed shop, so far as Senn's employees are concerned, but a *super-closed shop* in the respect that Senn is asked to relinquish his right to work in his own business to make a job for another union man.

We fully recognize that with the passage of time more and more legislation favorable to organized labor has been enacted and in a sense labor has achieved a preferred status under the law. We are not here questioning the Wisconsin Labor Code or other similar statutes in so far as they vest certain additional powers and privileges in organized labor, excepting only that we do question the constitutionality of the Wisconsin Labor Code as construed by the Supreme Court

of Wisconsin in the case at bar and *as applied to the facts here involved.*

In 1911 it was already pointed out by this court that:

> "The very fact that it is lawful to form these bodies (labor unions), with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. *When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.*" (Italics ours)
>
> *Gompers v. Buck's Stove & R. Co.*, 221 U. S. 418, 439, 55 L. Ed. 797.

In this year 1937, the statement hereinabove quoted is particularly significant. How much vaster and more powerful are labor unions today than they were in 1911. We are here invoking the protection of the Federal Constitution "to protect the one against the many."

We shall not refer individually to the many cases referred to by counsel in his brief. All of the cases cited by counsel are entirely foreign to the issues here involved.

Apparently, the case most relied upon by counsel is the case of *Wallace v. International Association of Mechanics*, 63 Pac. (2d) 1090, cited at pages 13 and 93 of the Brief of Respondents, and from which counsel quotes at some length at pages 94 and 105 of his brief. It is significant to note that while the picketing involved in that case was engaged in by parties not employees of the employer nor representing the employees, there was not involved the right of an employer to work in his own business. In this connection, the Oregon court stated:

> "We agree fully with the contention of the plaintiffs that there must be a reasonable justification for picketing. There must be an actual bona fide dispute. Picketing must be peacefully carried on and it must be for a lawful purpose."

Most of the opinion of the court in the *Wallace* Case was devoted to the question of the construction of the Oregon Labor Code and the court concluded that the Labor Code permitted picketing by labor unions representing none of an employer's employees. The court devoted only one paragraph to the question as to whether or not the statute, as construed by it, was constitutional, saying in this respect:

> "Is the statute as thus construed unconstitutional? Plaintiffs challenge the validity of the act upon three grounds, viz.: (1) It is class legislation and denies equal protection of the laws; (2) It violates the due process clause of the federal and state Constitutions; (3) It deprives courts of the inherent power to grant equitable relief. These same objections against the validity of the act were urged by complainants in a companion case of *Starr v. Laundry and Dry Cleaning Workers' Local Union*, this day decided, but the constitutionality of the act was sustained. We see no need of repetition."

Accordingly, it appears that the Oregon court in the *Wallace* Case held the Oregon Labor Code constitutional, construed as legalizing picketing by parties not employees, on the strength of its decision in the case of *Starr v. Laundry & Dry Cleaning Workers' Union*, 63 Pac. (2d) 1104. The *Starr* Case involved an actual strike on the part of the employees of the plaintiff. In that case, the court, among other things, stated:

> "• • • we must not be understood that picketing may be practiced merely to gratify a whim or caprice. Only when there is a reasonable ground for resorting to it, should the courts sanction it.
>
> • • •
>
> "Plaintiff also cites *Truax v. Corrigan*, 257 U. S. 312

(66 L. Ed. 254, 42 S. Ct. Rep. 124, 27 A. L. R. 375). This case treats the provisions of paragraph 1464 of the Revised Statutes of Arizona as denying the right of injunctive relief in cases involving labor disputes. Such a construction was given to the Arizona statute by the supreme court of Arizona. (See report of the same case, 20 Ariz. 7 (176 P. 570), and report of *Truax v. Bisbee Local No. 380*, 19 Ariz. 379 (171 P. 121).)

"In fact, the federal supreme court understood that the Arizona supreme court construed the Arizona statute to deny a remedy of any kind in cases involving a labor dispute. We quote from the opinion of the federal court:

"'The opinion of the State Supreme Court in this case, if taken alone, seems to show that the statute grants complete immunity from civil or criminal action to the defendants, for it pronounces their acts lawful.' *Truax v. Corrigan, supra.*

"It is true that following the above excerpt, the opinion contains the statement that, —

"'"If, however, contrary to the construction which we put on the opinion of the Supreme Court of Arizona, it does not withhold from the plaintiffs all remedy for the wrongs they suffered, but only the equitable relief of injunction, there still remains the question whether they are thus denied the equal protection of the law.'

"In the case at bar, the controlling provisions of the statute in question, as we construe them, merely prescribed the procedure to be followed and do not purport to deny the right to injunctive relief. We refer to sections 7 to 9, inclusive, of said chapter 355, Oregon Laws 1933." (Italics ours)

As we pointed out in our brief in opposition to the appellees' motion to dismiss, the Wisconsin Labor Code differs from the Norris-La Guardia Act and the labor codes of other states patterned after it in the respect that under Section 103.53 of the Wisconsin Labor Code, it declares the acts therein enumerated, including picketing and related activities in a labor dispute, as *lawful*. In this respect, the Wis-

consin Labor Code differs from the Oregon Labor Code and the significance of this distinction is apparent from the statement in the opinion of the Oregon court in the *Starr* Case that "The controlling provisions of the statute in question, as we construe them, merely prescribed the procedure to be followed and do not purport to deny the right to injunctive relief."

The Wisconsin Labor Code is not merely a procedural statute. The Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar and as applied to the facts here involved, denies appellant not only equitable relief but denies him any relief or remedy whatsoever, either in equity or at law. Particularly significant in this connection is the following language from the case of *Aberdeen Restaurant Corp. v. Gottfried, et al.*, 285 N. Y. S. 832, cited by counsel at pages 13 and 93 of his brief:

> "In *Levering-Garrigues Co. v. Morrin*, (71 Fed., 2d, 284) the Norris-La Guardia Federal Labor Injunction Act (29 U. S. C. A., secs. 101 to 115), upon which the state statute is patterned, was held applicable to actions commenced prior to the passage of that act where no final decree had been entered. That authority also holds the Federal Law constitutional. The court is not oblivious to the fact that there are certain elements in the basis of federal equity jurisdiction which prevent a complete analogy between the authority cited and the issue here under consideration so as to make the federal decision conclusive. The important distinction between federal equity jurisdiction and that of this court is that the former is statutory while the latter is constitutional. Naturally, whatever Congress has granted to the court of its own creation it may control. It therefore follows that no constitutional right is infringed by a congressional curtailment of a remedy or a withdrawal of remedial rights from the jurisdiction of the District Court, since the litigant never had any absolute constitutional right to have a federal court take jurisdiction. Vastly different is the position of the state court. Con-

stitutionally, equity jurisdiction is an inherent element of the state court. If a litigant is entitled to an equitable remedy and has no adequate legal remedy, a destruction of such right of redress would be a denial of justice and thus a violation of both state and federal constitutions. In fact, in *Duplex Co. v. Deering* (254 U. S., 443), the Supreme Court of the United States so held. It there seemed to the court that the state statute practically granted *'complete immunity of any civil or criminal action to the defendant, for it pronounced their acts lawful.'* In this matter, however, there is no deprivation of the right to an injunction. *If such was the effect of chapter 477 of Laws of 1935 it unquestionably would be unconstitutional.* (Italics ours) Here there is only an effort to limit the circumstances under which an injunction can be obtained."

Thus, in the *Aberdeen* Case, not only is the distinction between the Norris-La Guardia Act and the state labor codes patterned after it clearly drawn, but it is also definitely stated that if the labor code had the effect of granting complete immunity of any civil or criminal action on the ground that the acts were declared to be lawful, it would be inconstitutional.

Counsel, at page 125 of his brief, states:

> "We readily concede that if there is no labor dispute peaceful picketing should be enjoined, not because it is equivalent to physical violence, but because it works an injury upon another without legal cause."

Thus, counsel, in this statement, recedes from the position taken by him earlier in his brief that picketing is merely the exerting of "lawful economic pressure," and that it is legal as long as there is no violence or any other "unlawful" act engaged in. The very basis upon which we are claiming that the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin, as applied to the facts in the case at

bar, violates the Fourteenth Amendment to the Federal Constitution is that the picketing here engaged in works an injury upon Senn "without legal cause."

The numerous cases cited by us in our main brief on the merits amply establish that picketing, when engaged in for the purpose of forcing an employer to give up his right to work with his hands in his own business, is without legal cause, and that picketing engaged in by parties neither employees nor representing any employees of an employer is without legal cause.

Respondents' Brief, for the most part, is devoted to a consideration of cases holding the Norris-La Guardia Act constitutional under the facts here involved and holding state labor codes constitutional under the facts there involved. We are not taking the position that the Wisconsin Labor Code, under proper facts and under a different construction, would be unconstitutional. Our sole position on this is that the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar and as applied to the facts here involved, deprives the appellant of property without due process and denies him the equal protection of the laws.

PART II

REPLY TO BRIEF FILED BY AMICI CURIAE

The brief filed by the International Juridical Association, amici curiae, covers two main propositions:

(1) The jurisdiction of this Court, and

(2) The determination of the question on the merits.

A.

Jurisdiction.

It is asserted that this case "could have been decided upon principles of general law without reliance upon any statute."

In this connection counsel states that "the trial court found what it considered to be 'the controlling rule' in judicial doctrine and not in any statute," and that "the challenge here is not to a statute but to a judicial decision based upon principles of general law."

There are at least three answers to this position:

1. That the decision of the trial court was based upon a conclusion of law (Conclusion of Law No. 1, R. 29) that a labor dispute existed within the meaning of the Labor Code and not upon a determination that the activities of the defendants were legal apart from the Labor Code.

2. That the Supreme Court of Wisconsin based its decision, not on the common law, but on the statute, as evidenced by the following statement from the majority opinion:

> "The *legislature*, in outlining the public policy of this state, has precluded him (Senn) from an appeal to the courts for assistance until some unlawful act has become imminent, or something has occurred to start in motion the administration of equity rules, or the performance of the duties of policing." (R. 121) (Italics ours)

This is also evidenced by the opinion of Mr. Justice Fairchild on the motion for re-hearing and the statement therein contained that the question of the constitutionality of the Labor Code was fully considered by the court in its decision in the case. (R. 132)

3. The decisions of the Supreme Court of Wisconsin in cases arising prior to the adoption of the Wisconsin Labor Code established the fact that the law in Wisconsin, if no effect is to be given to the Wisconsin Labor Code, is that in a case involving facts substantially of similar character as those involved in the Senn case, the employer would have been entitled to and would have received relief.

A. J. Monday Co. v. Automobile, A. & V. Workers, 171 Wis. 532.

In that case, the Wisconsin Supreme Court stated:

> *"The provisions of Sec. 1, ch. 211 are simply declaratory of the law as it existed prior to its enactment.* No one is here contending that *Local No. 25* is an illegal combination. No question of wages is involved, so the declaration of this section as to the character of labor is immaterial here. Sub. 1, sec. 2, provides that working people may organize themselves into an association for certain purposes there enumerated. The strike involved in this case was not called for the purpose of doing any of the things therein enumerated. It is a strike purely and simply for the closed shop."

As we pointed out under Part I of our brief, the Supreme Court of Wisconsin, in the *Monday Case,* held that under the established law of the State of Wisconsin before the adoption of Chapter 211, which was an attempt to engraft upon the laws of Wisconsin certain provisions of the Clayton Act, a strike of employees against an employer to force him to agree to a closed shop was illegal. If, under the established law of the State of Wisconsin, as declared in the *Monday* Case, it was illegal for employees to strike against their employer to force him to agree to a closed shop, how can it be asserted,—as is asserted in the brief of the friend of the court,—that Senn was denied relief, not by virtue of the Wisconsin Labor Code, but "upon principles of general law"?

In the *Monday* Case it was held that it was illegal for the employees themselves to engage in a strike against an employer to force him to engage only union help. In the case at bar much more is involved. Here the picketing is engaged in not by Senn's employees but by strangers. Here the object of the picketing is not only for a closed shop but for a *super-closed* shop in the respect Senn is asked to relin-

quish his right to work in his own business so that a job will be made available for someone else.

In support of the proposition that picketing for the purpose of forcing an employer to give up the right to work in his own business is legal without reliance upon any statute, the case of *Zoat (Zaat)*, 172 Wash. 445, 20 Pac. (2d) 589, is cited. This case has already been considered by us in Part I of our brief. To what we have there said we would like to add that the question before the Washington court in the *Zaat* Case was whether or not the complaint stated a cause of action *in view of the Washington anti-injunction law.*

It is further stated in the brief of the friend of the court that "if it be argued that the decision below was based upon a Federal ground, we have shown that it was also based upon an independent non-federal ground broad enough to sustain the judgment." What we have heretofore stated answers this contention.

It is clearly established by the *Monday* Case and the case of *State, ex rel. Zillmer vs. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098, that but for the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar Senn would have been entitled to the relief demanded on the facts herein involved. The sole and only question involved in this case is whether or not the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar and as applied to the facts here involved, is valid under the Fourteenth Amendment of the Federal Constitution. If it is not, clearly, Senn would have been entitled to and would have received the relief which he sought.

It is next asserted in the brief of the friend of the court that "even if the decision appealed from had been based

solely upon the provisions of the Wisconsin Labor Code here sought to be questioned, the appellant has failed to show, and cannot show, that he is injured by such provision." What counsel had in mind in making the foregoing statement appears in the statement which follows: "There is nothing in this case to show that the provisions of the Wisconsin Labor Code here sought to be questioned are not merely declaratory of the general law as it existed in Wisconsin prior to the statute or that the case would have been decided in appellant's favor in the absence of statute." The *Monday* Case, we submit, conclusively answers this contention.

It is next asserted that "Under any view of the case the appeal should be dismissed for want of a substantial federal question." We respectfully submit that the federal question here involved is as substantial, if not more substantial, than the questions involved in the *Truax, Duplex, Tri-City, Hitchman,* and *Adair* Cases, to which we refer in our brief in opposition to appellees' motion to dismiss.

If the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin and applied to the facts in the case at bar, is to be sustained under the Fourteenth Amendment, the power of labor unions will be increased, and the scope of picketing will be extended, far beyond the scope for which it has heretofore been employed and championed. Picketing will become the common order of the day. Barbers, shoemakers, tailors, grocers, butchers, and all the rest of the employers in similar small businesses, who are willing to employ union help, will, nevertheless, be picketed to force them to give up the right to work with their hands in their own businesses. If the validity of such picketing for such object and purposes by labor unions representing none of an employer's employees is to be sustained, it will mean the end of all small businesses because, as pointed out in the minority

opinion in the case at bar and the majority opinion in the *Roraback Case*, no one will be able to start in business for himself or, for that matter, continue in business for himself, unless he has capital enough to engage in business on a large enough scale to enable him to advantageously devote his time and efforts in an administrative capacity only. If the decision of the Supreme Court of Wisconsin in this case is not reversed by this court, *it may well mean that it spells the doom of the small middle class business man.*

B.

The Merits.

It seems that the point most relied upon by counsel in the brief of the friend of the court, in considering the matter on the merits, is the point raised on the quesion of jurisdiction to which we have heretofore alluded, namely, that peaceful picketing was lawful in Wisconsin without the Labor Code.

Counsel attempts to distinguish the case of *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, on the ground that the Arizona statute, which was held invalid by this court, attempted to legalize conduct which the Supreme Court of Arizona had, prior to the enactment of the statute involved, declared unlawful. Counsel contends in this connection:

> "In Wisconsin, on the other hand, peaceful picketing has never been rejected as a lawful and legitimate instrument for the protection of the right of labor to bargain collectively."

As we have heretofore pointed out, this is not a correct statement and does not comport with the law.

A. J. Monday Co. v. Automobile, A. & V. Workers, 171 Wis. 532, 177 N. W. 867

State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, denying the appellant the injunctional relief which he sought, be reversed with directions to the Supreme Court of Wisconsin to direct the trial court to grant the relief requested by the appellant in his complaint.

All of which is respectfully submitted.

LEON B. LAMFROM,

Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

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Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

NATURE OF APPEAL.

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin, handed down on June 29th, 1936, affirming a judgment of the trial court, the Circuit Court of Milwaukee County, in favor of the respondents, denying the appellant a permanent injunction to enjoin the respondents from engaging in certain acts growing out of a labor dispute.